

# Transnational health law beyond the private/public divide

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DOI:

[10.1111/jols.12111](https://doi.org/10.1111/jols.12111)

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*Citation for published version (Harvard):*

Krajewska, A 2018, 'Transnational health law beyond the private/public divide: the case of reproductive rights', *Journal of Law and Society*, vol. 45, no. S1, pp. S220-S244. <https://doi.org/10.1111/jols.12111>

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## **Transnational health law beyond the private/public divide – the case of reproductive rights**

ATINA KRAJEWSKA\*

*This paper aims to revisit the debates concerning the nature and patterns of development of transnational law and global constitutionalism and it utilises the example of the rapidly growing field of transnational health law as a case study. It first highlights an important friction between two opposing theories of transnational law, which view the latter as either a predominantly private or a predominantly public construction. It then argues that these two views need not necessarily be seen as exclusive and diametrically opposed, but as two distinct, yet interrelated, aspects of the same process in which legal subjectivity is established in transnational law. The paper takes as a case study the emergence of legal subjectivity in the area of transnational law regulating assisted reproduction technologies, and it maps the two different conceptions of transnational law onto different stages in the process in which new subjects become legally visible. As such, the paper contributes to wider discussions concerning the nature of transnational law, transnational health law, and legal subjectivity.*

### **INTRODUCTION**

This paper aims to revisit the debates concerning the nature and patterns of development of transnational law and global constitutionalism, and it utilises the example of the rapidly growing field of *transnational health law* (THL) as a case study. For the purposes of this study, THL is defined as a complex set of laws combining international law as well as domestic public and private law norms affecting cross-border health issues, determinants, and solutions. This working definition draws on the early conceptions of transnational law, according to which transnational law is a body of law that encompasses ‘all law which regulates actions or events that transcend national frontiers’, including public and private international law and ‘other rules, which do not wholly fit into such standard categories.’<sup>1</sup> Despite decades of academic discussion, questions about the nature, role, and development of transnational law are far from settled. Scholars continue to disagree about the effects of globalisation on domestic and

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<sup>1</sup> P. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956), 1-8.

international law, and the degree of pluralisation<sup>2</sup>, fragmentation<sup>3</sup>, or privatisation<sup>4</sup> pervading the legal system at different levels of law formation. They grapple with the need to conceptualise a legal system that contains many sources of obligation, in which a convincing rule of recognition has not been formulated, the institutions for adjudication are often non-judicial, and processes of change are not easily articulated in terms of legal rules.<sup>5</sup> Consequently, much of transnational law theory consists of various attempts to bring order and coherence into the international arena. These attempts often revolve around the notion of global constitutionalism<sup>6</sup>, which focuses on the emergence of constitutional principles and structures within the global context.<sup>7</sup> Inevitably, the analysis of these processes varies considerably and has generated many controversies.

An important tension exists between theorists who claim that the constitutionalisation of transnational law is to be found mainly within the realm of private law, in private orderings increasingly autonomous vis-a-vis state structures, and theorists who contest these claims, arguing that transnational law is in fact predominantly public, in that public authorities – and courts in particular – play a vital role in its constitutional formation. This distinction is highly significant, not only because it represents two diametrically opposed views of the nature of transnational law, but because it reflects two different conceptions of the role of the law in shaping political, social and economic processes. It can also have important practical consequences as it can help us react to the problems occurring in connection with globalisation. If we accept that one of the implications of globalisation is a diminution the power of the state, we might want to focus our scholarly attention and policy efforts on non-state actors, e.g. NGOs, private companies, and professional associations. If,

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<sup>2</sup> N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford: OUP 2010); W. Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000), B. de Sousa Santos, *Towards a New Legal Common Sense* (London: Butterworths, 2002), R. Michaels, 'Global Legal Pluralism' (2009) 5 *Annual Review of Law and Social Sciences*, 243-262.

<sup>3</sup> M. Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics', (2007) 70 *Modern Law Review*, 1-30; M. Koskeniemi, P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', (2002) 15 *Leiden Journal of International Law* 3, 553-579.

<sup>4</sup> A-M. Slaughter, *A New World Order*, Princeton, (New York: Princeton University Press, 2004); S. Tully, *Corporations and International Lawmaking* (Boston Leiden: Martin Nijhoff, 2007).

<sup>5</sup> B. Kingsbury, 'The Concept of 'Law' in Global Administrative Law' (2009) 20 *The European Journal of International Law* 1, 23-57, 29.

<sup>6</sup> For instance to name a few: M. Loughlin, N. Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: OUP 2007); J. Klabbers, A. Peters, G. Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford: OUP 2009), N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford: OUP 2010); C. Thornhill, *A Sociology of Transnational Constitutions: Social Foundations of the Post- National Legal Structure* (Cambridge Studies in Law and Society 2016),

<sup>7</sup> N. Walker, 'Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe' in G. de Burca and Scott, *Constitutional Change in the EU: Between Uniformity and Flexibility* (Oxford: Hart, 2000), 9; N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review*, 317-359.

however, we discover that the role of the state or the judiciary is increasing, our attention might shift towards solutions involving government institutions, administrative bodies, and international or domestic courts. Taking this tension as a starting point, this paper has two main aims.

First, the paper argues that the two visions of transnational law need not necessarily be seen as exclusive and diametrically opposed. Instead, it proposes that we consider them as two distinct, yet interrelated, aspects of the same process: a process namely, in which legal subjectivity is established in transnational law. Consequently, the analysis is centred around the concept of invisible subjects and the process of visibilisation, which it addresses as a means to reconcile the two dominant views concerning transnational law formation. The two different conceptions of transnational law are mapped onto different stages of visibilisation through law. In order to achieve this aim the paper takes as a case study the emergence of legal subjectivity in the area of transnational law regulating assisted reproduction technologies (ARTs). More specifically, it focuses on the recent jurisprudential and legislative developments in the UK that led to the appearance of a new, hitherto largely invisible, group of subjects, i.e. *single persons* who become parents using ARTs (in particular, surrogacy).<sup>8</sup> The long and complex journey of single persons to legal parenthood is mapped onto the divide between the private and public conceptions of transnational law. While the historical invisibility of single persons in fertility treatment is associated with the fact that transnational ART services are mainly governed by private law, the establishment of legal subjectivity, which in this case has occurred through human rights litigation, is seen as belonging to the realm of public law. Consequently, the process of visibilisation serves as an axis, on which the two conceptions of transnational law can be reconciled. At the same time, the paper claims that visibilisation should not be seen as linear, but rather as part of a multiple, recursive process, punctuated by iterations of norm making among transnational actors, cycles of lawmaking in nation-states, and patterns of engagement between them.<sup>9</sup> As such, the paper contributes to wider discussions concerning the nature of transnational law and the way in which legal subjectivity is affected by the centrifugal and multilevel processes of globalisation.<sup>10</sup>

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<sup>8</sup> T. Jarrett, Briefing Paper: Children: surrogacy, and single people and parental orders (UK), Number 8076, 5 February 2018, available at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8076>. The choice of this case study is not accidental. It is chosen because of its explanatory value, as it brings into sharp focus broader problems emerging in the field of transnational health law in the context of assisted reproduction, including in vitro fertilization and surrogacy.

<sup>9</sup> T. C. Halliday, 'Recursivity of Global Normmaking: A Sociolegal Agenda' (2009) *5 Annual Review of Law and Social Science*, 263–89.

<sup>10</sup> A. Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, (Cambridge: CUP 2016); C. Menke, 'The Self-Reflection of Law and Politics', (2011) 18

Second, the paper contributes to theoretical debates about *transnational health law* (THL) by demonstrating that THL escapes straightforward categorisations as a system of either private or public law. It shows that THL could potentially be examined in a perspective that offers support for either vision of transnational law. On the one hand, it could be said to display strong tendencies of ‘privatisation’, in that cross-border healthcare may be delivered and managed by private actors and regulated by professional codes. On the other hand, the fact that health rights have recently undergone a process of unprecedented judicialisation indicates the ever-growing presence of the state in the delivery of increasingly globalised health care. This analysis is particularly important, because while the problem of the ‘medical’<sup>11</sup> or ‘reproductive tourism’<sup>12</sup> – perhaps more aptly called ‘medical migration’<sup>13</sup>, or ‘reproductive exile’<sup>14</sup> – has drawn considerable media<sup>15</sup> and academic<sup>16</sup> attention, theoretical constructions of transnational health law remain relatively limited<sup>17</sup>. This is far from ideal, especially since sexual and reproductive rights, understood as rights enabling individuals to participate fully in the decision-making process concerning their sexual and reproductive health and well-being<sup>18</sup>, constitute an important global

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*Constellations* 2, 124–34; A. Fischer-Lescano, ‘Subjektlose Rechte’ (2017) 50 *Kritische Justiz* 4, 475–496.

<sup>11</sup> G. Pennings, ‘Reproductive Tourism as Moral Pluralism in Motion’ (2002) 28 *Journal of Medical Ethics* 6, 337–341; M.D. Horowitz, J.A. Rosensweig, Ch A. Jones ‘Medical Tourism: Globalization of the Healthcare Marketplace’ (2007) 9 *MedGenMed* 4, 33.

<sup>12</sup> G. Pennings, ‘Legal harmonization and reproductive tourism in Europe’ (2004) 19 *Human Reproduction*, 2689–2694.

<sup>13</sup> C. Thompson, ‘Medical migrations afterword: Science as a vacation?’ (2011) 17 *Body & Society*, 205–13.

<sup>14</sup> R. Matorras ‘Reproductive exile versus reproductive tourism’ (2005) 20 *Human Reproduction* 12, 3571–2; M.C. Inhorn, et al., ‘Rethinking reproductive “tourism” as reproductive “exile”’ (2009) 92 *Fertility and Sterility* 3, 904 – 906.

<sup>15</sup> H. Sheffield, ‘Medigo: the Berlin-based startup sending patients abroad for surgery’, *The Independent*, 27 October 2017; M. Brignall, ‘Poland’s medical tourism clinics offer half-price treatment to the world’, *The Guardian*, 1 June 2014; R. Ramesh, ‘This UK patient avoided the NHS list and flew to India for a heart bypass. Is health tourism the future?’, *The Guardian*, 1 February 2005; BBC News, ‘Despair over ban in India’s surrogacy hub’, 22 November 2015; IMTJ News, ‘India introduces legislation to ban surrogacy tourism’, *International Medical Tourism Journal*, 7 December 2015, available at: <https://www.imtj.com/news/india-introduces-legislation-ban-surrogacy-tourism/>.

<sup>16</sup> M. R. Nahman, ‘Reproductive Tourism: Through the Anthropological “Reproscope”’, (2016) 45 *Annual Review of Anthropology*, 417–32; M. C. Inhorn and P. Patrizio, ‘Infertility around the globe: new thinking on gender, reproductive technologies and global movements in the 21st century’ (2015) 21 *Human Reproduction Update* 4, 411–426; N. Hudson et al., ‘Cross-border reproductive care: a review of the literature’, (2011) 22 *Reproductive Biomedicine Online* 7, 673–85.

<sup>17</sup> J. Harrington, ‘Migration and access to health care in English medical law: a rhetorical critique’, (2009) 4 *International Journal of Law in Context* 4, 315–335; R. Fletcher, ‘Peripheral governance: administering transnational health-care flows’, (2013) 9 *International Journal of Law in Context* 2, 160–191; I. Glenn Cohen, *Patients with Passports: Medical Tourism, Law and Ethics*, (Oxford: Oxford University Press 2015); Botterill, D., Pennings, G. and Mainil, T. (eds). *Medical Tourism and Transnational Health Care* (Basingstoke: Palgrave Macmillan 2013).

<sup>18</sup> R. Cook, B. Dickens, M. Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law*, (Oxford University Press 2003), 12. More specifically, *reproductive rights* have been defined as resting on ‘the recognition of the basic right of all couples and individuals to

challenge.<sup>19</sup> The analysis of the process in which invisible subjects become visibilised can offer a useful and more progressive vision of the otherwise complex and meandering developments of transnational health law, and transnational reproductive health law in particular<sup>20</sup>.

## THEORETICAL FRAMEWORK

The theory of transnational law is a dynamic and rapidly changing field concerned with the status and the role of law in an increasingly globalised web of regulatory regimes, actors, norms, and processes. As a field of inquiry 'transnational law emerges as a series of contemplations about the form of legal regulation with regard to border-crossing transactions and fact patterns transgressing jurisdictional boundaries that involve public and private actors and norms.'<sup>21</sup> Consequently, transnational law has been seen as a *sui generis* legal domain, developing autonomously in relation to both national and international constitutional norms.<sup>22</sup> The debates about the nature of transnational law have been closely connected to the widespread attempts, to transpose constitutionalism onto the global arena.<sup>23</sup> Within this framework, two important theoretical approaches have emerged in recent years.

### 1. The expansion of global private orderings

One important body of literature concerning transnational law accentuates global institutional and normative pluralism and the distinctive horizontal

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decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence'. See: *Programme of action of the International Conference on Population and Development, Cairo, 1994*. New York: United Nations; 1995: paragraph 7.2-7.3.

<sup>19</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 22: The Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/22, 4 March 2016. See also: Goal 3 and Goal 5 in the Sustainable Development Agenda 2030, available at:

<https://sustainabledevelopment.un.org/post2015/transformingourworld>

<sup>20</sup> The terms transnational reproductive health law is used to describe a subsystem of transnational health law that regulates sexual and reproductive health.

<sup>21</sup> P. Zumbansen, 'Transnational Law, Evolving' (2011). *Comparative Research in Law & Political Economy. Research Paper No. 27/ 2011*, available at: <http://digitalcommons.osgoode.yorku.ca/clpe/65>

<sup>22</sup> C. Scott, "'Transnational Law" as Proto-concept: Three conceptions' (2009) 10 *German Law Journal* 7, 859, 873-4.

<sup>23</sup> D. Grimm, *Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart* (Duncker & Humblot GmbH, 1995); A. Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot, 2001), 38-92.

character of the contemporary constitutional system.<sup>24</sup> What follows from this premise is the claim that the multiple cross-border and inter-functional exchanges in global society create and necessitate an increasingly flexible, inherently pluralistic, and multi-centered system of legal norm production and enforcement. Importantly, this account of institutional and normative pluralism necessarily accepts the diminishing role of the state in international law and society. The state becomes one among many law-producing *loci* of authority. Furthermore, theories of constitutional pluralism claim that global society is marked by 'the incommensurability of authority claims - in particular of the discrete claims to final authority over the interpretation and extent of jurisdiction of the various political units.'<sup>25</sup> Some of these conceptualisations have led to observations that private law has begun to extend beyond its conventional boundaries and is now able to perform some of the classical public law (state) functions in setting out the normative and institutional structures for the governance of the global society.<sup>26</sup>

In this respect, one of the most salient constitutional theories in research on transnational law has been set out by Gunther Teubner, who developed the concept of global societal constitutionalism, which describes a process in which 'private actors not only participate in the political power processes of global governance, but also establish their own regimes outside of institutionalized politics.'<sup>27</sup> According to Teubner, when functional spheres, such as economy, science, or medicine become global, the power of the state to set limits and navigate their outward expansive tendencies and regulate the conflicts between regimes disappears. As a result, where there is no political or legal framework facilitating internal and external communication, private orderings, including science and medicine, make universal claims and set global agendas transversing national borders.<sup>28</sup> Such global expansion of functional spheres can lead to 'inward explosion', and it can trigger different crises that threaten the existence of the particular system. It is at that moment that the pressure for global self-foundation (and autonomisation) increases and reveals its 'jurisgenerative potential', and it is then that subsystems of world society begin to develop their own constitutional legal norms.<sup>29</sup> According to Teubner, who in this respect

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<sup>24</sup> N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford: OUP 2010); W. Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000); B. de Sousa Santos, *Towards a New Legal Common Sense* (London: Butterworths, 2002); P. Zumbansen, 'Transnational Legal Pluralism', (2010) 1 *Transnational Legal Theory* 2, 141-189.

<sup>25</sup> N. Walker, 'The Idea of Constitutional Pluralism', (2002) 65 *Modern Law Review*, 317-359, 338. For an overview of pluralist theories: R. Michaels, 'Global Legal Pluralism', (2009) 5 *Annual Review of Law and Social Science*, 243-262.

<sup>26</sup> G-P. Calliess and P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford: Hart Publishing, 2010) 75, 166-8, 243.

<sup>27</sup> G. Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalisation*, (Oxford: Oxford University Press, 2012), 9.

<sup>28</sup> Ibid 43-44.

<sup>29</sup> Ibid 59.



follows Luhmann, full self-constitutionalisation is impossible without legal norms enabling and supporting the realisation of system's full autonomy.<sup>30</sup> For this reason, this theory accords great importance to basic (fundamental) rights. Although the historical role of basic rights has been to protect the precarious results of social differentiation from their politicisation, in contemporary global society fundamental rights are directed not only against the state action, but against the intrusions of other expansive social systems, such as economy, medicine, science. Rights are the social counter-institutions that exist inside individual sub-systems and restrict their expansion from within. As aptly observed by Verschraegen '[a]nalogous to the fundamental rights in the context of the nation-state, these fundamental rights are Janus-faced. On the one hand, they have to enable autonomisation of each functional system, enabling free and equal access for everybody. On the other hand, they have set the boundaries for the totalising tendencies of autonomised communicative media.'<sup>31</sup> Therefore, an important feature of this vision of transnational law is that law, and basic rights in particular, are developed mainly as a part of private normative sphere.

## **2. Transnational law as a predominantly public law construction**

Alternative theories, developed in parallel to Teubner's conceptualisation, view transnational law and global constitutionalism as a predominantly public law construction, albeit not without its complexities. Within this body of literature, there are many variations. There are those who argue that the nascent constitution of global society is derived directly from international human rights law, imposing universal constitutional constraints on legislation at national and supranational levels.<sup>32</sup> Consequently, the phenomenon of litigation based on human rights claims acquires particular importance. The human rights norms governing these claims are of such border-crossing nature that they increasingly both undercut and surpass the territorial boundaries upon which various jurisdictional competencies have been predicated.<sup>33</sup> Therefore, according to this view, transnational law largely overlaps with the expanding human rights law. Another body of literature focuses on the role of administrative law in shaping the transnational exchanges of global society and it addresses the convergence of administrative law-type principles and practices between otherwise disparate

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<sup>30</sup> *ibid* 107.

<sup>31</sup> G. Verschraegen, 'Differentiation and Inclusion: A Neglected Sociological Approach to Fundamental Rights', in: M.R. Madsen and G. Verschraegen, *Making Human Rights Intelligible: Towards a Sociology of Human Rights*, (Oxford: Hart Publishing 2013), 61-80.

<sup>32</sup> S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008); D.Friedman and D. Barak-Erez (eds), *Human Rights in Private Law* (Oxford: Hart Publishing, 2001).

<sup>33</sup> P. Zumbansen, 'Transnational Law, Evolving' (2011). *Comparative Research in Law & Political Economy. Research Paper No. 27/ 2011*, available at: <http://digitalcommons.osgoode.yorku.ca/clpe/65>



areas of governance.<sup>34</sup> This vision of law ascribes legal status to a great number of different forms, ranging from binding decisions of international organizations to non-binding agreements in intergovernmental networks and to domestic administrative action in the context of global regimes.<sup>35</sup> Nevertheless, legal and non-legal norms can be distinguished. According to Kingsbury, the main proponent of this approach, even in the normatively highly fragmented and heterarchical global world, the distinction between law and non-law relies on constructions of 'publicness', i.e. 'the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such.'<sup>36</sup> Finally, the theory, which has gained prominence as an alternative to Teubner's idea of societal fragments, while sharing the same systems-theoretical basis, is the theory of transnational constitutions developed in recent years by Chris Thornhill.<sup>37</sup>

The central argument put forward by Thornhill is that transnational constitutions are not in a relation of discontinuity *vis-a-vis* modern state-based constitutions. Instead, he claims that transnational constitutionalism is a stage in the development of modern constitutionalism and it can better be interpreted as a new tool for consolidating nation states' power. Using a historical-sociological approach, Thornhill proposes a conception of transnational constitutionalism in which the growth of global constitutional norms has provided a stabilizing framework for the functions of state institutions. Importantly, for Thornhill the idea of constitutional (universal) rights has been fundamental in the process of state formation, because they allowed states, i.e. the political system, 'to explain itself as a legitimate actor and... peacefully integrate its citizens under laws obtaining recognition and compliance.'<sup>38</sup> In global society, this importance of rights as a function of inclusion for the nation-state does not disappear, but it is reinforced at the global level. International human rights developed after the World War II, and incorporated into domestic law by national societies, are seen as normative institutions that strengthened the inclusionary structure of their political systems, and that 'allowed these political systems to act at a level of

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<sup>34</sup> B. Kingsbury, N. Krisch and Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law & Contemporary Problems* 3, 15.

<sup>35</sup> B. Kingsbury, N. Krisch, 'Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *The European Journal of International Law* 1, 1-13, 3.

<sup>36</sup> B. Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *The European Journal of International Law* 1, 24-, 31.

<sup>37</sup> J. Priban, 'Constitutionalism as Fear of the Political? A comparative analysis of Teubner's Constitutional Fragments and Thornhill's A Sociology of Constitutions' (2012) 39 *Journal of Law and Society* 3, 441-471.

<sup>38</sup> C. Thornhill, 'Towards a Historical Sociology of Constitutional Legitimacy' (2008) 37 *Theory and Society*, 161-, 174. See also: C. Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*, (Cambridge: Cambridge University Press 2011).

unprecedented autonomy, producing laws, reliably and inclusively, without constantly unsettling risk of annexation by private groups'.<sup>39</sup>

According to Thornhill, in this respect, rights-based litigation has clearly acquired a constituent role at the level of transnational norm construction. Furthermore, rights-oriented litigation can create and generate norms of higher rank that are able to traverse previously separate jurisdictions. In these transnational settings, litigation has begun to produce 'a defining constitutional grammar for society, and the regulatory structure of global society in its extra-national dimensions is increasingly formed by subjects acting as litigants'.<sup>40</sup> This is possible, in part, because of the use of the principle of proportionality, through which principles of *public* law are imprinted on all social phenomena.<sup>41</sup> Consequently, contemporary society is increasingly defined by the fact that its political system, both nationally and transnationally, constitutes itself directly through human rights, which are identified with single persons in society. '*Transnational rights* are thus in the process of becoming a *fifth tier* of rights in society's inclusionary structure, and many acts of political inclusion are now based not in rights exercised by particular persons or groups of persons or populations but in rights constructed contingently, *within the law*.'<sup>42</sup> It is the idea of fundamental rights, inextricably linked with the concept of legal subjectivity that provides a useful basis for reconciliation between the two distinct theories of transnational law.

### **3. The process of acquiring legal subjectivity as an axis for reconciliation**

For Teubner, the main function of fundamental rights at the global level is the self-limitation of private ordering and its protection from 'inward explosion' and collapse. At the same time, the creation and integration of fundamental rights contribute to the autonomisation and self-constitutionalisation of private orders. Fundamental rights created without recourse to the national level also 'specify system-specific conditions in such a way that a free and equal inclusion is permitted.'<sup>43</sup> Thornhill traces the inclusionary potential of fundamental rights, back to the national legal system, which - (mainly) through courts and rights-based litigation - integrates international human rights standards stabilising political power and transforming the domestic social structures. Nevertheless,

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<sup>39</sup> C. Thornhill (2011), 161.

<sup>40</sup> C. Thornhill, *A Sociology of Transnational Constitutions: Social Foundations of the Post- National Legal Structure* (Cambridge Studies in Law and Society 2016), 393.

<sup>41</sup> Ibidem, 404.

<sup>42</sup> Ibidem, 418.

<sup>43</sup> G. Verschraegen, 'Differentiation and Inclusion: A Neglected Sociological Approach to Fundamental Rights', in: M.R. Madsen and G. Verschraegen, *Making Human Rights Intelligible: Towards a Sociology of Human Rights*, (Oxford: Hart Publishing 2013), 61-80, 77.

following Durkheim and Luhmann, they both view rights as a social institution.<sup>44</sup> Both view rights (subjective, fundamental, human rights) as a vehicle of structural transformation and a vehicle for legal inclusion.

It is argued here that it is the concept of inclusion – through visibilisation and legal subjectivisation – that holds the key to the reconciliation of these two theories. Visibilisation is understood as a process in which subjects who remained absent or excluded from the legal sphere acquire visibility through legal mechanisms as subjects of rights. This article shows how litigation can be constructed as a process, in which exclusion is made visible and subjects become legally relevant because of the acknowledgment of their particular entitlements.<sup>45</sup> In cases where litigation is successful, visibilisation can be seen as tantamount with the establishment of legal subjectivity. However, in cases where litigation is unsuccessful, the distinction between visibilisation and subjectivisation<sup>46</sup> will become relevant. In such cases, even if it does not create new rights, litigation helps to shed light on subjects in the context of particular legal expectations and entitlements. In such cases, as demonstrated below, litigation is often followed by the formal acquisition of legal subjectivity through other mechanisms, e.g. legislation. However, litigation will always inevitably construct litigants as subjects of rights and obligations. In this respect, visibilisation becomes a crucial moment in the process of subjectivisation and legal inclusion. The following analysis demonstrates that the two theories of transnational law form two separate yet interconnected dimensions of the same process i.e. the complex and recursive process of inclusion of new subjects into the realm of transnational law. In Teubner's words, it is 'a case of dialectic without synthesis'.<sup>47</sup> Both theories are necessarily dependent on each other. It is only the combination of both sides of the difference that brings out the special hybrid nature of THL.

The argument follows the journey of single persons in fertility treatment from legal obscurity into legal light. It begins by analysing their exclusion from the legal framework, which led to their invisibility – that is, to their being placed in the state of *interstitial legality*. It subsequently examines the development of

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<sup>44</sup> G. Verschraegen, 'Systems Theory and the Paradox of Human Rights', in: M. King and C. Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisal and Applications*, (Oxford: Hart Publishing: 2006,) 101-125.

<sup>45</sup> In this respect the concept of visibilisation/invisibilisation used here differs from the notion of (in)visibilisation of the law's paradox utilised by Luhmann in *Die Gesellschaft der Gesellschaft* (Frankfurt: Suhrkamp 1997).

<sup>46</sup> In this respect, the concept of subjectivisation differs from the term 'assujettissement', coined by Foucault. While it is difficult to deny that empowerment is never the only purpose of any law or regulation, this focus of this paper is on the *processes* of visibilisation and the establishment of legal subjectivity. See: M. Foucault, *The Subject and Power*, (1982) 8 *Critical Inquiry* 4, 777-795; M. Foucault, *The History of Sexuality*. New York: Pantheon, 1978. Reprinted as *The Will to Knowledge*, (London: Penguin, 1998).

<sup>47</sup> G. Teubner, 'In the blind spot: The Hybridization of Contracting' (2006) 8 *Theoretical Inquiries in Law*, 51-71, 61.

transnational law regulating assisted reproduction in light of Teubner's theory of societal constitutionalism. In this respect, it demonstrates the expansion of the system of transnational health law as a system of private law and identifies signs of its latent 'constitutionalisation'. In the last part of the paper, the argument focuses on the process of visibilisation through human rights litigation. The analysis of the domestic and supranational litigation demonstrates the way in which public law assumes an important role in the development of transnational law. The analysis of the courts' arguments shows the evolution of the human rights system and its impact on transnational health law. This leads to important conclusions concerning the nature of transnational health law and the future research agenda in the field of transnational law.

## **TRANSNATIONAL REPRODUCTIVE HEALTH LAW AS A *PRIVATE* GLOBAL FRAGMENT**

### **1. Invisibilisation of single persons in fertility treatment in the UK**

There is a growing body of evidence that suggests that the number of single persons who use assisted reproduction technologies (ARTs) when they want to become parents is rising.<sup>48</sup> A single woman who chooses fertility treatment to become pregnant will usually use a donor sperm. A single man wishing to have a child in this way will have to use a surrogate and will either use the surrogate's ovum and his sperm, or she will carry an embryo created by his sperm and a donated egg. Women who for whatever reason cannot undergo IVF or fall pregnant themselves might also wish to use a surrogate. In cases like this, the single woman's ova and donated sperm will usually be used to create an embryo later placed in the surrogate's womb and carried by her to term. The surrogate therefore does not use her own eggs, and is genetically unrelated to the baby. In the UK this area of biomedicine is regulated by the Human Fertilisation and Embryology Act 1990 (HFE Act 1990, as amended by the HFEA 2008) and the Surrogacy Arrangements Act 1985. Neither of these Acts expressly mentions single persons as a separate class of patients. Neither has ever prevented single persons from accessing assisted reproduction technologies as such. This means that in principle, single persons can undergo IVF and use surrogacy offered by a UK fertility clinic.<sup>49</sup> However, they face a major obstacle once the child is born,

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<sup>48</sup> A. Krajewska, Access of single women to fertility treatment: a case of incidental discrimination? (2015) 23 *Medical Law Review* 4, 620-645; S. Graham, 'Choosing single motherhood? Single women negotiating the nuclear family ideal', in: D. Cutas & Chan S. (eds.), *Families: Beyond the nuclear ideal* (London: Bloomsbury Academic 2012), 97-109; S. Golombok, et al. 'Single Mothers by Choice: Mother-Child Relationships and Children's Psychological Adjustment.' (2016) 30 *Journal of Family Psychology* 4, 409-418; Symposium: Men, Fertility and Assisted Reproductive Technologies (2013) 27 *Reproductive BioMedicine Online* 3, 223-322.

<sup>49</sup> This does *not* mean that their treatment will be funded by the state. Resource allocation in the NHS at the local level falls within the remit of the so-called Clinical Commissioning Groups (CCGs), which set eligibility criteria for funding fertility treatment in their fertility policies. These policies vary greatly across the country and pose separate challenges.

because under the current legislation they are not be able to establish legal parenthood with regard to their children born out of surrogacy.

This is due to the fact that according to the HFE Act 1990 (as amended by the HFE Act 2008) the woman giving birth to a child is considered its legal mother. This means that the surrogate will always initially be treated as the mother of the child born via surrogacy. If she is married, her husband will be presumed to be the legal father.<sup>50</sup> The HFE Act 2008 establishes mechanisms, based on consent, in which this assumption can be rebutted. It also sets out additional ways in which legal parenthood can be attributed to other parties directly or indirectly involved in fertility treatment. The detailed conditions of these mechanisms are outlined in the so-called 'agreed parenthood' provisions, which form an integral part of the 2008 Act.<sup>51</sup> However, because surrogacy has always been seen as a more complicated procedure, in that it involves the surrogate and the intended parents (who will often also be the gamete donors), the HFE Act 2008 established special rules concerning the transfer of legal parenthood from the surrogate to the intended parents after the birth of the child.<sup>52</sup> Couples using surrogacy can apply for parental orders to acquire legal parenthood over their child within six months of its birth.<sup>53</sup> However, both single men and single women using surrogacy are absent from the relevant provision of the Act, which means that they are essentially denied the right to apply for parental orders.

The decision to exclude single persons from this procedure originated in the recommendations of the initial report concerning assisted reproduction prepared by the Warnock Committee in 1984. However, it was confirmed during the Parliamentary debates over the 2008 reforms of the HFE Act 1990. Consequently, section 54(1) HFE Act 2008, setting out the principles concerning

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<sup>50</sup> S. 33 HFE Act 2008.

<sup>51</sup> S. 37-44 HFE Act 2008. For detailed discussion see: J. McCandless and S. Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73 *Modern Law Review* 2, 175-207; K. Horsey, and S. Sheldon, 'Still Hazy after all these years: The Law Regulating Surrogacy' (2012) 20 *Medical Law Review* 1, 67-89.

<sup>52</sup> S. 54 HFE Act 2008 in conjunction with S. 35-47 HFE Act 2008. A parental order under section 54 of the HFE Act 2008 may be made where: (1) an application is made by *a married couple, civil partners of each other, or two persons who are living as partners in an enduring family relationship* and are not within prohibited degrees of relationship in relation to each other; (2) the child has been carried by a woman other than one of the applicants as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination; (3) the gametes of at least one of the applicants were used to bring about the creation of the embryo; (4) an application is made within six months of the birth of the child; (5) the child's home is with the applicants at the time of the application and at the time the order is made; (6) either or both of the applicants is domiciled in the United Kingdom or the Channel Islands or the Isle of Man at the time of the application and at the time the order is made; (7) both the applicants have attained the age of 18 by the time the order is made; (8) the woman who carried the child and any other person who is a parent (including a person treated as the father or parent by virtue of the relevant legislation) have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

<sup>53</sup> S. 54 (3) HFE Act 2008

parental orders, makes it clear that a claim for a parental order can only be made by two people.<sup>54</sup> This implies a couple, whether heterosexual or same-sex, and excludes single men and women. As argued elsewhere, this continuous exclusion has been the result of decades of marginalisation of single persons in family life.<sup>55</sup> In the context of assisted reproduction, it is further reproduced in the way in which NHS funding is allocated. Clinical Commissioning Groups (CCGs) responsible for resource allocation at the regional level will often deny single persons (especially single men and women in need of surrogacy) the opportunity to use NHS funding to access fertility treatment.<sup>56</sup> This means that the only option for single men and women in need of surrogacy is to seek treatment privately in the UK or travel abroad. The financial hurdles exist independently of the inability to apply for parental orders to establish parental responsibilities with regard to their children born via surrogacy and they exacerbate the problem of possible exclusion. Most single persons who wish to have biologically linked children who need to use fertility treatment will therefore have to seek treatment in private fertility clinics, and those who also need a surrogate will not be able to establish legal parenthood. Most of these relationships will thus be governed by commercial contracts and agreements, i.e. private law.

Consequently, although neither the HFE Act 1990, nor the HFE Act 2008 have ever precluded single persons from accessing fertility treatment, for years they have remained ‘unintelligible within the legal norms’<sup>57</sup> and largely invisible to the regulators and providers of ART services.<sup>58</sup> Nevertheless, despite these legal and policy limitations, anecdotal evidence collected by surrogacy agencies and law firms specializing in family law suggests that there are single men and women who have become single parents using ARTs (in the UK or abroad) and who live with their families in the UK.<sup>59</sup> They often remain lost and largely

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<sup>54</sup> HFEA Information about the changes to parenthood provisions from 2010. From 2010, male homosexual couples could apply for parental orders following surrogacy arrangements: <http://www.hfea.gov.uk/2927.html#2>

<sup>55</sup> K. Holden, *The Shadow of Marriage: Singleness in England 1914-1960*, (Manchester University Press 2007); S. Budgeon, Couple Culture and the Production of Singleness (2008) 11 *Sexualities* 3, 301–325. In the context of assisted reproduction see: A. Krajewska, Access of single women to fertility treatment: a case of incidental discrimination? (2015) 23 *Medical Law Review* 4, 620–645 and A. Krajewska and R. Cahill-O’Callaghan, *When a single man wants to be a father – the invisible subjects in the law regulating fertility treatment* – unpublished monograph.

<sup>56</sup> A. Krajewska and R. Cahill-O’Callaghan, *ibidem*.

<sup>57</sup> N. Naffine, ‘Can Women be Legal Persons?’ in: S. James & S. Palmer (eds), *Visible Women*, (Oxford: Hart Publishing 2002), 80.

<sup>58</sup> For instance, research conducted between 2016-2017 confirmed that the HFEA does not hold any data concerning the number of single men seeking or receiving treatment in the UK. HFEA FOI response F-2016-00174, 25 July 2017. See also: A. Krajewska, R. Cahill-O’Callaghan, note 55 above.

<sup>59</sup> See: Brilliant Beginnings Adoption Agency: <http://www.brilliantbeginnings.co.uk/intended-parents/single-dad> or Natalie Gamble Associates: [http://www.nataliegambleassociates.co.uk/knowledge-centre?user\\_type=single-men&service=surrogacy](http://www.nataliegambleassociates.co.uk/knowledge-centre?user_type=single-men&service=surrogacy). Also see: H. Prosser, N. Gamble, ‘Modern surrogacy practice and the need for reform’ (2016) 4 *Journal of Medical Law and Ethics* 3, 257–274 and N. Gamble, ‘Crossing

invisible in what could be called the realm of *interstitial legality*. The latter is defined as a space where despite numerous often-overlapping national and international public and private norms, subjects find themselves in a space of a legal void, *in-between* different jurisdictions, *in-between* binding and non-binding legal norms, or even *in-between* legal and non-legal normative orders. In the case of cross-border ARTs, interstitial legality forms a part of transnational reproductive health law entangled with the ever-expanding spheres of globalised markets, science, and medicine. The following section analyses the way in which it occurs.

## 2. Single persons as invisible subjects in the realm of interstitial legality

Single persons, who require the assistance of a surrogate, have to face the general challenges posed by the law regulating surrogacy in the UK. The latter has been criticised as complex and ‘thoroughly confused’.<sup>60</sup> The main complications result from the lack of enforceability of the surrogacy agreements and the problem (and criminalisation) of commercialization of surrogacy.<sup>61</sup> First of all, while the vast majority of surrogacy agreements are successfully fulfilled<sup>62</sup>, the agreements depend to a large extent on the trust between parties and carry some deal of uncertainty<sup>63</sup>. Secondly, in the UK it is an offence for anyone other than the surrogate and the intended parents to negotiate a surrogacy arrangement ‘on a commercial basis’, and it is a criminal offence for intended parents, surrogates and agencies to advertise their willingness to participate in

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the line: the legal and ethical problems of foreign surrogacy’ (2009) 19 *Reproductive BioMedicine Online* 2, 151-2; Most recently, for a private account of the experiences of single persons in surrogacy (including a changing relationship status), see: J. Phillip, *Surrogacy: Our Family's Journey* (Leicester: Matador 2017).

<sup>60</sup> M. Warnock, ‘Making Babies: Is There a Right to Have Children?’ (Oxford: Oxford University Press 2002), 91.

<sup>61</sup> K. Horsey and S. Sheldon ‘Still hazy after all these years? The law regulating surrogacy’ (2012) 20 *Medical Law Review* 1, 67-89; N. Gamble, ‘Crossing the line: the legal and ethical problems of foreign surrogacy’ (2009) 19 *Reproductive BioMedicine Online* 2, 151-2; J. Tobin, ‘To prohibit or permit: What is the (human) rights response to the practice of international commercial surrogacy?’ (2014) 63 *International and Comparative Law Quarterly* 2, 317-352; M. Brazier A. Campbell, S. Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation. Report of the Review Team. (The Brazier Report)*. London: Department of Health; 1998; available at: [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_4014373.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4014373.pdf).

<sup>62</sup> H. Prosser, N. Gamble, Modern surrogacy practice and the need for reform, (2016) 4 *Journal of Medical Law and Ethics* 3, 257-274.

<sup>63</sup> For this reason, the Surrogacy UK Working Group on Surrogacy Law Reform recommended a number of specific changes, including the pre-authorisation of parental orders so that legal parenthood is conferred on intended parents at birth and the inclusion of single persons in the parenthood provisions. The Surrogacy UK Working Group on Surrogacy Law Reform also suggested that c) Parental orders should be available to single persons and to intended parents where neither partner has used their own gametes (‘double donation’). See: K. Horsey ‘Surrogacy in the UK: Myth busting and reform’ Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015).



or facilitate surrogacy.<sup>64</sup> As a result, websites and online support groups have emerged within the UK, where potential gamete donors and surrogate mothers make contact with intended parents. Members of these forums make private arrangements that are intended to lead to the birth of a child, but they do so in a regulatory vacuum. The matching methods are almost entirely informal and fall outside the law. At the same time, the ART services accompanying surrogacy will normally be governed by an array of public and private law, i.e. the regulatory framework established HFE Act 1990 (as amended by the HFE Act 2008) and private contracts for the provision of health services delivered by private fertility clinics.

The lack of formalized institutional support, the shortage of surrogates in the UK, and the length of the whole process are likely to be an escalating factor in the decision to travel abroad.<sup>65</sup> Although the full extent of cross-border reproductive care is not precisely known, research cited by the European Society of Human Reproduction and Embryology (ESHRE) suggests that that around 5% of all fertility care in Europe and almost 3% of all US cycles involves cross-border patients, with numbers being most probably higher in specialized procedures such as surrogacy.<sup>66</sup> Commercial surrogacy has been mainly practiced in Israel, and in the state of California (USA), where surrogacy births are primarily managed by private, commercial agencies that screen, match, and regulate agreements according to their own criteria and without state interference.<sup>67</sup> Treatments are also economic and legal transactions, which often fall between

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<sup>64</sup> H. Prosser, N. Gamble, 'Modern surrogacy practice and the need for reform' (2016) 4 *Journal of Medical Law and Ethics* 3, 257-274; N. Gamble, 'Crossing the line: the legal and ethical problems of foreign surrogacy' *Reproductive* (2009) 19 *BioMedicine Online* 2, 151-2.

<sup>65</sup> H. Prosser, N. Gamble, 'Modern surrogacy practice and the need for reform' (2016) 4 *Journal of Medical Law and Ethics* 3, 257-274.

<sup>66</sup> European Society of Human Reproduction and Embryology, Fact Sheets 1 January 2017, available at: <https://www.eshre.eu/~media/sitecore-files/Press-room/Resources/1-CBRC.pdf?la=en>. Also see: F. Shenfeld et al. 'The ESHRE taskforce on cross border reproductive care. Cross border reproductive care in six European countries.' (2010) 25 *Human Reproduction*, 1361-8. The literature addressing the growing phenomenon of cross-border surrogacy is vast and it includes e.g. F.W. Twine, *Outsourcing the womb: Race, class and gestational surrogacy in a global market* (New York/London: Routledge 2015); R. Cook et al (eds), *Surrogate Motherhood: International Perspectives* (Oxford: Hart Publishing 2003); W. Chavkin and J. Maher (eds) *The globalization of motherhood: Deconstructions and reconstructions of biology and care* (New York: Routledge 2010); L. Culley and N. Hudson, 'Fertility Tourists or Global Consumers? A Sociological Agenda for Exploring Cross-border Reproductive Travel' (2010) 4 *International Journal of Interdisciplinary Social Sciences* 10, 139-50.

<sup>67</sup> Until recently India was one of the main destinations for British patients. See: A. Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker', (2010) 35 *Signs* 4, 969-992. However, recent changes to the law have banned surrogacy for unmarried couples and single persons. In addition, the Surrogacy (Regulation) Bill 2016 aims to ban commercial surrogacy and aim introduce more restrictions for surrogates and intended parents. See: Surrogacy (Regulation) Bill 2016, available at: <http://www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/>

national and international law.<sup>68</sup>

Single persons who decide to seek treatment overseas will often choose jurisdictions where rules regulating parenthood are more beneficial to intended parents, e.g. in the USA the single man can be registered on the birth certificate of his child.<sup>69</sup> However, international surrogacy presents its own distinct challenges with regard to the establishment of legal parenthood. The process for bringing the child born from surrogacy to the UK can be very long, costly, and convoluted.<sup>70</sup> International surrogacy is further complicated by the fact that parenthood and nationality are separate legal institutions. In particular, foreign family law does not have an effect in the UK and the UK nationality law and English family law are governed by different rules.<sup>71</sup> This means that, even if the child (born abroad) is entitled to British nationality based on the nationality of his/her intended parent, the latter will not be automatically considered to be the child's legal parent. This is also true when the parenthood has been established in the country where the child was born.<sup>72</sup> As a result, in situations where parental rights and responsibilities have been officially acknowledged in one country, but not recognised in another, some families continue their lives under the surface, in a grey area between law and non-law, in the state of *interstitial legality*.

This realm of interstitial legality emerges as one of the results of the expansion and 'inward explosion' of the reproductive health care system as it is coupled with the system of free market economy. *Prima facie* the system is released from the constraints of domestic legislators and escapes political power.<sup>73</sup> Many

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<sup>68</sup> R. Scherman et al. 'Global commercial surrogacy and international adoption: parallels and differences' (2016) 40 *Adoption & Fostering* 1, 20 – 35.

<sup>69</sup> For instance in California law is very favourable to surrogacy. In rulings of the California Supreme Court in cases of *Calvert v. Johnson* (1993) and *Buzzanca v. Buzzanca* (1998), California first established and then reinforced its position that intent governs in the determination of parentage in gestational surrogacy situations. See: E. Sills (ed), *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (Cambridge: Cambridge University Press 2016), 285.

<sup>70</sup> Contrary to misconceptions, the mean overall cost of surrogacy is much higher than for surrogacy in the UK. See Horsey (2015), *ibidem*.

<sup>71</sup> British Nationality Act 1981, c 61. Also see: Home Office, Nationality policy: surrogacy, London July 2017, available at: <https://www.gov.uk/government/publications/surrogacy-nationality-policy-guidance>.

<sup>72</sup> Foreign & Commonwealth Office, Surrogacy Overseas guidance, London June 2014, available at: <https://www.gov.uk/government/publications/surrogacy-overseas>.

<sup>73</sup> This has been well reflected in the Explanatory Memorandum to the Draft Recommendation on the Children's Rights related to Surrogacy adopted by the Council of Europe which admitted that the Parliamentary Assembly as a whole is 'probably (...) too divided on the human rights and ethical issues related to surrogacy to find anything but circumstantial majorities in relation to some of the issues at stake'. In particular, the Rapporteur Ms R. de Sutter, stated that she does 'no longer believe that such a majority exists on whether or not altruistic surrogacy arrangements should be allowed, nor on whether we should encourage States which do allow for-profit surrogacy arrangements to set minimum standards with a view to protecting surrogate mothers and surrogate-born children from abuse.' See: Council of Europe's Committee on Social Affairs,

domestic decision-makers choose criminalisation and exclusion as a way of dealing with the contingencies brought about by the advances in the field of science and medicine.<sup>74</sup> This in turn leads to an expansion of the system of cross-border reproductive health care that can result in a crisis. Several such crises have been reported across the globe, for instance when transnational commercial surrogacy was seen as exploitative and highly disadvantageous to 'poor and uneducated' women, who act as surrogates in India and other less developed countries.<sup>75</sup> Another example concerns the problems described above concerning the parental rights over children born as a result of cross-border assisted reproduction, in which children and their parents are left without sufficient protection.<sup>76</sup>

### **3. Private constitutionalisation of the transnational reproductive health regime**

The foregoing analysis of the legal status of single persons in the context of fertility treatment seems to confirm Teubner's theory concerning autonomisation and the expansion of private sectors in world society. Furthermore, observed from this perspective, it is arguable that the 'inward explosion' of the system of transnational health law that resulted in crisis, triggered jurisgenerative potentials aimed at the self-limitation, and eventually the self-constitutionalisation of this 'societal fragment'. According to Teubner, 'global fragments' should be able to develop their own fundamental standards and rules regarding system-specific access conditions without recourse to national level jurisdiction. The growing autonomy and private constitutionalisation of the system of transnational reproductive health law is exemplified in the attempts to develop global and regional standards concerning ART services, including surrogacy.

The field is increasingly regulated by international soft-law instruments and principles of professional practice. The number and diversity of these instruments produced by various professional and supranational organisations

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Health and Sustainable Development, *Children's rights related to surrogacy* (Council of Europe 2016).

<sup>74</sup> This situation will be exacerbated in national settings, in which all forms of surrogacy are criminalised, e.g. in France, Germany, Italy, Spain.

<sup>75</sup> K Schanbacher, 'India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women', (2014) 25 *Hasting Women's Law Journal* 2, 201-220. Also see: F. Baylis, 'Transnational commercial contract pregnancy in India' in F. Baylis & C. McLeod (eds) *Family-making: Contemporary Ethical Challenges* (Oxford: Oxford University Press, 2014); A. Pande, 'Transnational commercial surrogacy in India: Gifts for international sisters?', *Reproductive Biomedicine Online* 23 (2011): 618-625; S. Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (London: Routledge, 2003), pp. 134-181.

<sup>76</sup> E.g. *AB (Surrogacy; Domicile)* [2016] EWFC 63 (07 March 2016); *CC v DD* [2014] EWHC 1307 (Fam) (14 February 2014); *AB v DE* [2013] EWHC 2413 (Fam); *Re A & B (Parental Order Domicile)* [2013] EWHC 426 (Fam); *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

are overwhelming. For instance, in 2007, the International Federation of Fertility Societies (IFFS) set itself a goal of developing a series of Practice Standards of Infertility Care appropriate to its global constituency.<sup>77</sup> In 2011, it adopted Standard 13 entitled 'Cross International Border Treatment consistency in standards' which aimed to improve access to high-quality and safe assisted conception services, guaranteeing the informed choice of the patient.<sup>78</sup> Furthermore, in 2006, the International Committee for Monitoring Assisted Reproductive Technology (ICMART), a network responsible for the collection and dissemination of worldwide data on ART, published the first glossary of ART terminology.<sup>79</sup> In December 2008, the WHO, with the assistance of the ICMART, the Low Cost IVF Foundation (LCIVFF) and the International Federation of Fertility Societies (IFFS), organized an international WHO meeting in order to develop an internationally accepted set of definitions that would help standardize and harmonize international data collection to monitor the availability, efficacy, and safety of ART interventions.<sup>80</sup> Many of these documents are based on the principles of human dignity, informed consent, and privacy of the patient. At the same time, specific standards concerning surrogacy have started to emerge. For instance, the Hague Conference on Private International Law has set up an Expert Group to analyse private international law issues encountered in relation to the legal parentage of children, and more specifically in relation to international surrogacy arrangements. In 2017 the Group reached 'an agreement in principle on the feasibility of developing a binding multilateral instrument dealing with the recognition of foreign judicial decisions on legal parentage'.<sup>81</sup> At the end of that year, another NGO, the International Social Service (ISS), highlighted a set of principles to protect the rights of children in surrogacy arrangements, including human dignity, the right to identity (name, nationality and family relations), access to information about one's origins as well as the importance of respecting the rights of the surrogate mother and intended parents.<sup>82</sup>

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<sup>77</sup> International Federation of Fertility Societies, *Policy Statement 2: Cross Border Treatment* (IFFS, 2010).

<sup>78</sup> IFFS, *Policy No. 13: Cross International Border Treatment consistency in standards* (IFFS 2011): [http://c.ymcdn.com/sites/www.iffs-reproduction.org/resource/resmgr/Docs/Standard\\_13crossborderMarch\\_.pdf](http://c.ymcdn.com/sites/www.iffs-reproduction.org/resource/resmgr/Docs/Standard_13crossborderMarch_.pdf)

<sup>79</sup> F. Zegers-Hochschild et al. International Committee for Monitoring Assisted Reproductive Technologies. The ICMART glossary on ART terminology (2006) 21 *Human Reproduction*, 1968–70.

<sup>80</sup> F. Zegers-Hochschild et al., International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology, 2009, *Fertility and Sterility* Vol. 92, No. 5, November 2009, 1520–24.

<sup>81</sup> Permanent Bureau of the HCCH on Private International Law, News from the Hague Conference on Private International Law: Permanent Bureau of the HCCH on Private International Law, *Uniform Law Review*, Volume 22, Issue 4, 1 December 2017, Pages 984–995.

<sup>82</sup> <http://www.iss-ssi.org/index.php/en/news1>

At the regional level, the European Society of Human Reproduction and Embryology (ESHRE) has been very active in setting professional standards that proved influential internationally. The ESHRE Task Force on Ethics and Law has issued several Statements concerning different legal and ethical issues arising in the context of ARTs. In 2005 they published a Statement concerning surrogacy, which concluded that surrogacy is an acceptable last-resort method of ART for specific medical indications, for which only reimbursement of reasonable expenses is allowed.<sup>83</sup> Most recently the Task Force commented on ethical issues arising from claims to assisted reproductive services made by single persons, gay couples, and transsexual people. Importantly for our analysis, the document stresses that denying access to treatment to any of these groups could not be reconciled with *human rights*. If there are concerns about the implications of assisted reproduction on the wellbeing of any of the persons involved, these concerns have to be considered in the light of the available scientific evidence.<sup>84</sup>

These developments can be seen as confirming the constitutionalisation of the transnational health law as a process of private global ordering, where concrete standards of fundamental rights are being developed incrementally and where fundamental rights are positivised beyond and above existing international politics and law.<sup>85</sup> However, as demonstrated above (and argued elsewhere<sup>86</sup>) transnational health law and its self-constitutionalisation are largely hidden and invisible. Legal norm formation belongs to a large extent to the realm of private law and is contained in private contracts agreed between fertility clinics, patients and, where required, insurance companies. The latency of private law, of the contract, has been explained by Teubner as necessary for its construction. ‘The contract’s inter-discursive binding effect must remain invisible to contemporary society as a whole and its self-description. It can be observed only in its effects on the economy, law, and production, but not itself as relationality between them. (...) The latency is not only necessary, but needs to be secured against its actualization. Both the (constructed) object and the latency itself need to remain invisible in the blind spot, to avoid the collapse of the construction.’<sup>87</sup>

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<sup>83</sup> F. Shenfield et al., ESHRE Task Force on Ethics and Law 10: Surrogacy, (2005) 20 *Human Reproduction* 10, 2705–2707.

<sup>84</sup> G. de Wert et al., ESHRE Task Force on Ethics and Law 23: medically assisted reproduction in singles, lesbian and gay couples, and transsexual people, (2014) 29 *Human Reproduction* 9, 1859–1865.

<sup>85</sup> G. Verschraegen, Differentiation and Inclusion: A Neglected Sociological Approach to Fundamental Rights, in: M.R. Madsen and G. Verschraegen, *Making Human Rights Intelligible: Towards a Sociology of Human Rights*, Hart Publishing 2013, 61–80.

<sup>86</sup> A. Krajewska, Bioethics and Human Rights in the Constitutional Formation of Global Health (2015) 4 *Laws* 4, 771 – 802.

<sup>87</sup> Teubner explains further that ‘In contractual thought, it was no doubt the humanistic concept of the legal contract that safeguarded the latency. As agreement between people, as harmony of two declarations of will, as binding promise between persons, as common source of binding norms, it carefully avoids sight of the multiplicity of hermeneutic differences described above. The full consent of two people overcomes all distinctions, and the person-to-person giving of

Transnational principles, procedures, and structures develop incrementally through such contracts and through professional codes developed by healthcare professionals involved in the delivery of transnational ART services. These developments seem to be in line with Teubner's version of sectorial constitutionalism, in which fundamental rights are developed through various interconnected channels such as arbitration tribunals, contracts between private actors, or pressure from NGOs. The vast majority of such norms and their addressees will remain invisible. In Teubner's vision, subjects, principles, and structures become visible when there is crisis or conflict destabilising the system. Rules that are adopted internally by the system form sectorial constitutions.

However, at this point transnational reproductive health law seems to depart – at least to some extent – from Teubner's theory of constitutionalisation governed by private law. While some of the conflicts emerging in the context of ARTs may be resolved by an international or private adjudicative body, e.g. international mediators, the vast majority of disputes have so far been decided by national and regional human rights courts. In the case of single persons in fertility treatment, the destabilising effects of the expansion of the cross-border reproductive care have been revealed in the course of domestic litigation. The analysis in the following section shows that, while the process of visibilisation may begin – as proposed by Teubner – in the realm of private law, the process of inclusion and the mechanisms in which subjects acquire legal subjectivity is *concluded* in the realm of public law. The following analysis shows how this inclusionary process unravelled in the context of single persons in fertility treatment.

## **THE *PUBLIC* FACE OF TRANSNATIONAL HEALTH LAW**

### **1. Acquiring legal subjectivity as a result of human rights litigation**

As mentioned earlier, many single persons who used surrogacy to become parents have remained invisible for years, living their lives in a state of *interstitial legality*. They have recently acquired visibility through human rights litigation before English courts, in the cases of *Re Z (A Child) (Surrogate Father: Parental Order)* [2015] and *Re Z (A Child) (No 2)* [2016]. Both cases concerned the same applicants, i.e. a child, Z, conceived in the USA with the applicant father's sperm and a third party donor's egg implanted in an unmarried American surrogate mother, and the single father. Upon their return to the UK, the father who wished to establish his legal parenthood with regard to his son, challenged S 54(1) of the 2008 Act as inconsistent with Articles 8 and 14 of the European Convention of Human Rights (ECHR). It was argued that the

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word alone is seen as able to keep the divergent projects together.' See: G. Teubner, 'In the blind spot: The Hybridization of Contracting' (2006) 8 *Theoretical Inquiries in Law*, 51-71, 59.

requirement is a discriminatory interference with a single person's rights to private and family life, because it does not allow single persons to apply for a parental order. In the first of the two judgments, the court held that S 54 of the HFEA 2008 could not be read down to enable a parental order to be made in respect of a single applicant. The court, thus, rejected the application made by the single father and his son and the case failed. However, the parties involved in the case obtained visibility as subjects of rights in the sphere of family life. The right not to be discriminated against gained particular importance. In the course of the process the Secretary of State for Health conceded that the provision was incompatible with Art 14 taken *in conjunction with* Art 8 of the ECHR. The visibilisation and acknowledgment of certain legal entitlements by the government enabled the court to deliver the second judgment and make a declaration of incompatibility of sections 54(1) and (2) of the HFE Act 2008 with the Art 14 ECHR in conjunction with Art 8, insofar as they prevent the applicant from obtaining a parental order on the sole ground of his status as a single person as opposed to being part of a couple. The President of the Family Division of the High Court, Munby LJ, was satisfied that in all the circumstances the declaration sought was soundly based in fact and law. At the same time, he declined to go further and suggest ways in which the relevant provisions could be cured.<sup>88</sup> Consequently, it could be argued that the litigation has done nothing more than shed light onto a previously relatively invisible group of subjects. However, by making a declaration of incompatibility in the second case the court in fact did more than shed light. By declaring provisions of domestic law incompatible with the ECHR, the court acknowledged the existence of a right that has been violated and in turn allowed for a transformation of a *potential* legal subjectivity (inherent in the ECHR) into a specific legal subjectivity at the domestic level. It also enabled the UK government to respond and remedy the inconsistencies and human rights violations.

Following the judgment, in November 2017, the UK Government laid a proposal before Parliament to allow single people to apply for parental orders in order obtain parental rights over their children born as a result of surrogacy.<sup>89</sup> If approved by Parliament, single persons will obtain new rights, which will put them, at least formally, on equal footing with couples who become parents via surrogacy. As a result, the process of visibilisation facilitated through litigation can be said to have led to the emergence of new legal subjects in the field of social and family life. This emergence of new subjectivity will undoubtedly have a transformative effect not only on the law regulating assisted reproduction, but also on the realm of transnational reproductive health law, as it supports the

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<sup>88</sup> *Re Z (A child) (No 2)* [2016] EWHC 1191 (Fam), paras. 27-30.

<sup>89</sup> The Government's Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement, Cm 9525, November 2017, available at: [www.gov.uk/government/publications](http://www.gov.uk/government/publications)



further expansion and autonomisation of the system. As mentioned earlier, the factors influencing this inclusionary dynamic are multiple and complex. One of the factors that facilitated the inclusion of single persons into the legal community is the jurisprudence of the European Court of Human Rights (ECtHR) concerning the protection of family life guaranteed by the right to private life (Art. 8 ECHR), the right to found a family (Art. 12 ECHR), and the prohibition of discrimination (Art. 14 ECHR). The section below traces the ECtHR's reasoning that led to the emergence of single persons (and their children) as new subjects of transnational health law.

## 2. Visibilisation through international human rights litigation

Over the years, the case law of the ECtHR has changed considerably, becoming more affirming of different family constellations and roles, in particular of families headed by single persons. As of today there have been no cases before the ECtHR involving specifically single men or women in fertility treatment. However, the line of jurisprudence concerning reproductive autonomy<sup>90</sup>, privacy<sup>91</sup>, adoption<sup>92</sup> and international surrogacy<sup>93</sup> has played a crucial role in shaping the inclusionary processes in the UK.

The most relevant for the present discussions is the case of *Wagner and J.M.W.L. v Luxembourg* (2007),<sup>94</sup> in which a court in Luxembourg refused to declare a fully valid adoption order issued to a single mother by a Peruvian court enforceable in Luxembourg. The refusal stemmed from the absence of provisions in domestic legislation allowing single parents to adopt, but was contrary to the accepted practice of automatic recognition of Peruvian judgments. The ECtHR considered that the court's refusal amounted to an 'interference' with the right to respect for family life, and observed that a broad consensus existed in Europe allowing single persons to adopt without restrictions. The Court took the view that the decision not to declare the judgment enforceable did not take account of social reality, i.e. that the baby girl was already living with her adoptive mother. As a

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<sup>90</sup> *Evans v UK* (2007), 46 EHRR 34; *Dickson v UK* (2008) 46 EHRR 41; *Glass v. UK* (2004) 1 FLR 1019; *Tysiąc v. Poland* (2007) application no. 5410/03; *Niemietz v. Germany* (1992) Application no. 13710/88; *Pretty v. the United Kingdom* (2002) Application no. 2346/02; *Brüggemann and Scheuten v. Germany* (1976) Application No. 6959/75.

<sup>91</sup> The right of a couple to conceive a child and to make use of medically assisted procreation for that end is clearly an expression of private and family life that comes within the ambit of Article 8. However, the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt, rather, it presupposes the existence of a family or at the very least the potential relationship that arises for example from a lawful and genuine adoption. See: *Paradiso & Campanelli v Italy* (2017) ECHR 96, §141; *SH v Austria* (2011) Application no. 57813/00; *E.B. v. France* (2008), Application no. 43546/02.

<sup>92</sup> *Frette v France* (2002) 38 EHRR 438; *E.B. v France* (2007) ECHR 211, *Wagner and JM WL v Luxembourg* (2007) Application No. 76240/01, *Gözüm v. Turkey* (2015) Application no. 4789/10.

<sup>93</sup> *Labassee v. France* (2014), *Mennesson v. France* (2014).

<sup>94</sup> *Wagner and JM WL v Luxembourg* (2007), Application No. 76240/01.

result, the applicants encountered obstacles in their day-to-day lives and the child did not enjoy the legal protection, which would enable her to integrate fully into her adoptive family. Importantly for the present discussion, the Court considered that the domestic courts could not reasonably disregard the legal status which had been created on a valid basis in a foreign country and which corresponded to family life within the meaning of Article 8. They could not reasonably refuse to recognise the family bond which *de facto* linked the applicant and her child and which deserved full protection.

Furthermore, the Court reiterated that, in the enjoyment of the rights and freedoms recognised by the Convention, Article 14 prohibited different treatment of persons in analogous situations without objective and reasonable justification. The Court noted that, as a result of the refusal to declare the judgment enforceable, the child born as a result of transnational surrogacy had been subjected in her daily life to a difference in treatment compared with children whose full adoption granted abroad was recognised in Luxembourg. The child's links with her birth family had been severed and had not been replaced with full and complete links with her adoptive mother. The child therefore found herself in a legal vacuum and Ms Wagner suffered the indirect consequences of the obstacles facing her child, which had not been remedied by the fact that an open adoption had been granted in the meantime. The Court saw no justification for such discrimination, especially since prior to the events in question, full adoption orders had been automatically granted in Luxembourg in respect of other Peruvian children adopted by unmarried mothers. The Court therefore held that there had been a violation of Article 14 taken in conjunction with Article 8.

In two other cases concerning the registration of children born as a result of international surrogacy using donated ova and one of the husbands' sperm – *Labassee v. France*<sup>95</sup>, *Mennesson v. France*<sup>96</sup> – the Court held unanimously that the refusal of French authorities to issue a birth certificate that recognised commissioning parents as legal parents of the children violated the children's rights to private life guaranteed by Article 8. The Court observed that the right to private life means that everyone has the right to establish their identity, including parentage. The inability to do so raised a serious question about the compatibility with the principle of the best interests of the child, which remained the Court's main concern. The Court did not find violation of the right to private life of the parents. Nevertheless, in finding a breach of the children's rights under Article 8 in conjunction with Article 14, the Court recognised the impact of this violation on the parents' lives. Hence, the Court accepted the applicants'

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<sup>95</sup> *Labassee v. France*<sup>95</sup>, Application no 65941/11, Council of Europe: European Court of Human Rights, 26 June 2014.

<sup>96</sup> *Mennesson v. France*, Application no 65192/11, Council of Europe: European Court of Human Rights, 26 June 2014.

arguments that the refusal to authorise adoption was ineffective in practice, as it did not deprive the children of the legal parent-child relationship with the mother and father recognised under Californian law and did not prevent the applicants from living together in France. Crucially, the Court voiced criticism over the fact that ‘their effective and affective family life was “*legally clandestine*”’. This was particularly shocking in the case of the first applicant, who was the biological father of the children and there was nothing to prevent that relationship from being officially recorded.’ [emphasis added]<sup>97</sup>

This line of jurisprudence reflects a growing concern with uncertainties stemming from gaps in the law accompanying transnational processes facilitating family formation. The Court seems determined to avoid legal fiction where it is unnecessary and align legal facts with social reality. Interestingly, like the English courts, the ECtHR uses the prohibition of discrimination to grant visibility to subjects leading ‘legally clandestine’ lives. The use of this phrase is significant. First of all, it demonstrates that a legal vacuum, leading to invisibility and a life under the surface of the law, can amount to violation of human rights. Secondly, it indicates a redefinition of the right to respect private and family life. Originally, the main purpose of Article 8 was to protect the individual from the unjustified interference of the state. With time, the scope of protection widened to encompass negative and positive obligations of the state to protect the individual in his/her relationships with others in society. The main aim remained the same, to guarantee an intimate sphere of life in which the individual can develop freely.<sup>98</sup> More recently, the interpretation of Article 8 has undergone further transformations as a result of which privacy started to encompass special and informational autonomy and the right to develop one’s personality.<sup>99</sup> It could be said that one of the primary purposes of the right to privacy has been to guarantee a certain degree of invisibility that will allow the self-fulfilment and self-development of the individual. However, the judgments discussed above seem to go beyond this purpose. By pronouncing state actions leading to legally clandestine lives to be in breach of the right to privacy, the Court has turned the provision of Article 8 ‘on its head’.<sup>100</sup> The right to private life now encompasses the right to remain visible to public authorities. Visibility here is clearly connected to the notions of legal subjectivity and citizenship. In addition, as a result of the decision, a positive obligation arises on public authorities to guarantee their citizens a degree of visibility, to the extent that is necessary to pursue the development of one’s personality. It also implies that

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<sup>97</sup> *Mennesson v France*, para 67.

<sup>98</sup> *Botta v. Italy*, 24 February 1998, Application No. 21439/93. See also: *Burghartz v. Switzerland*, 22 February 1994, § 24, Series A no. 280 B.

<sup>99</sup> A. Krajewska, The right to personality in (post-)genomic medicine – new way of thinking for the new frontier, 1 *European Human Rights Law Review*, 2011, 54-70.

<sup>100</sup> Although the ECtHR has often criticised restrictive abortion laws for creating space for unsafe clandestine abortions, it has never considered obscurity in itself a violation of human rights.

there is a distinction between acceptable and unacceptable forms of legal clandestineness. The unacceptable ones seem to be those, which create uncertainty and perpetuate discrimination and exclusion in social life.

This line of jurisprudence has been severely criticised for creating double standards for surrogacy at home and abroad.<sup>101</sup> It has been argued that the decisions ‘forced’ national authorities to register children born through surrogacy in another state, based on the best interests of the child, while surrogacy remained unlawful under domestic law. This was perceived as a backdoor acceptance of surrogacy and as depriving states of the decision-making power in this regard. However, this criticism supports the claim that the ECtHR jurisprudence has created new rights and new subjects of transnational law. More importantly, the analysis of the ECtHR jurisprudence, further developed by national courts, demonstrates that one of the main functions of rights lies in their emancipatory potential. In the cases discussed above, the *revealing* power of fundamental (human) rights is embedded in the wording of the judgments. Rights empower people, if not judicially then at least politically. In the cases described above rights, acquired through human rights litigation, are likely to have a transformative effect on legal and social structures and institutions internationally and domestically. Even in cases in which the ECtHR has rejected the applicant’s claims<sup>102</sup>, the judgments have demonstrated the gravity of the problem of cross-border surrogacy and its devastating implication for individual lives.<sup>103</sup> This visibilisation may provide further impetus necessary for the development of transnational norms either through litigation or through international bodies such as the Hague Conference Expert Group on the Surrogacy/Parental Project, which could further influence domestic laws and practices. In this respect, visibilisation through right-based litigation is a vital part in the acquisition of legal subjectivity. At least in its later stage visibilisation through public law fits squarely with the analysis offered by Thornhill, who observes that:

‘...litigation configures, and it adds new rights to, constructions of political citizenship, and it builds up, from everyday activities and requirements, a complex evolving profile of the claims and expectations that can be attached to citizenship. In particular, litigation is able to align legal claim to international

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<sup>101</sup> K. Trimmings and P. R. Beaumont, ‘Recent Jurisprudence of the European Court of Human Rights in the Area of Cross-Border Surrogacy: Is There Still a Need for Global Regulation of Surrogacy?’, in: G. Biagioni, and F. Ippolito (Eds.), *Migrant Children in the XXI Century: Selected Issues of Public and Private International Law* (Editoriale Scientifica 2016).  
<[https://www.abdn.ac.uk/law/documents/CPIL\\_2016-4.pdf](https://www.abdn.ac.uk/law/documents/CPIL_2016-4.pdf)>.

<sup>102</sup> *Paradiso and Campanelli v Italy* [2017] ECHR 96; *D. and Others v Belgium* (Application No 29176/13), 8 July 2014.

<sup>103</sup> M. Iliadou; Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v Italy*, *Medical Law Review*, published online on 21 February 2018, fwy002,  
<https://doi.org/10.1093/medlaw/fwy002>.

norms, and it is able to graft new rights onto given legal expectations on this basis. Moreover, in changing the rights profile of persons in society, litigation is able to generate new legal subjects, and to bring into visibility legal persons that had historically not been recognized. Litigation is thus able to create models of citizenship that step beyond the aggregate of rights defined and conferred by national bodies, and to trace out new potentials for broader legal-political mobilization and recognition.’<sup>104</sup>

## CONCLUSIONS

This paper aimed to analyse the rapidly developing system of transnational health law in the context of broader debates about the nature and patterns of development of transnational law and global constitutionalism. More specifically, it aimed to argue that the two important divergent claims about the development of transnational law, made by Gunther Teubner and Chris Thornhill, could be reconciled if seen as two aspects of the process in which new subjects of transnational (health) law acquire visibility and legal subjectivity. The analysis revealed complex processes of law formation that call into question the persistent dichotomy in the theoretical constructions of transnational law. The example of single persons accessing ARTs helps to put forward the following argument. The process in which new subjects acquire visibility at the transnational level consists of two stages. The first stage includes a tacit development of global private orderings through self-regulation and system-specific basic rights. It depends on, and is influenced by, the exclusionary and inclusionary processes that take place at the domestic level. The case study demonstrated that the social exclusion of individuals in domestic setting has led to their marginalisation in law, policy and medical practice and their invisibility in an important sphere of social life. However, their lack of visibility did not preclude their participation in the ever-expanding and open transnational system of cross-border reproductive care supported by free-market economy. As claimed by Teubner, the rapid expansion of the THL system has been accompanied by its *tacit* self-regulation, i.e. a development of system-specific principles and rights concerning individuals involved in transnational exchanges. This stage is dominated by private law, which ‘irritates’ the international human rights system. This development resulted in an ‘eruption’ and visibilisation of the problem before national and supranational courts.

The second stage is the process of visibilisation through rights-based litigation, which can lead to the emergence of new transnational legal subjectivity. This stage can be aligned with Thornhill’s theory of transnational constitutionalism,

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<sup>104</sup> C. Thornhill, *The Sociology of Law and the Global Transformation of Democracy* CUP 2018 (forthcoming).

in which national courts incorporate human rights principles developed earlier by international human rights courts to shed light on new legal subjects. The case study demonstrated how the jurisprudence of the UK courts developed the general principles developed by the ECtHR and triggered a legislative process that will lead to inclusion of a new group of subjects into the social space created through assisted reproduction. The ECHR itself would arguably not have developed its line of jurisprudence if it were not for the expansion of the cross-border health care and the formation of internal legal principles through self-regulation. Consequently, domestic jurisprudence will be able to release the potential for further expansion of the system of reproductive medicine, not only in the UK, but also transnationally. This transnational legal subjectivity then transgresses national jurisdictional borders and influences the self-constitutionalisation of private orderings. Therefore, recursivity occurs not only between international and national levels (especially in the context of litigation), but also between the public and the private sphere.

There are two broader conclusions concerning transnational health law stemming from this analysis. First, transnational health law displays many features of a global private ordering or a societal fragment. Nevertheless, its development still depends to a large extent on the legal mechanisms of exclusion and inclusion developed by public state institutions. Second, it constitutes an important example of the way in which the inclusionary processes are shaped by complex internal and external pressures released in the public *and* the private sphere. Further studies into the relationship between these interrelated processes are required. The notion of invisibility and visibilisation of new subjects constitutes a useful framework through which complex and dynamic processes of development of transnational health law can be analysed. As the study of legal subjectivity in the field of transnational health law develops, the questions concerning the formation of legal principles and structures in transnational health system need to be placed on the investigative agenda. A sociological approach to these questions seems to carry a great promise of original insights.